

CRS Report for Congress

The U.S. Foreign Intelligence Surveillance Court and the U.S. Foreign Intelligence Surveillance Court of Review: An Overview

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Summary

The national debate regarding the National Security Agency's Terrorist Surveillance Program (TSP) focused congressional attention on the U.S. Foreign Intelligence Surveillance Court and the U.S. Foreign Intelligence Surveillance Court of Review created by the Foreign Intelligence Surveillance Act. Congressional interest in these courts has been heightened by the January 17, 2007, letter from Attorney General Gonzales to Chairman Leahy and Senator Specter advising them that a Foreign Intelligence Surveillance Court judge had "issued orders authorizing the Government to target for collection international communications into or out of the United States where there is probable cause to believe that one of the communicants is a member or agent of al Qaeda or an associated terrorist organization," stating that all surveillance previously occurring under the TSP will now be conducted subject to the approval of the Foreign Intelligence Surveillance Court, and noting that the President has determined not to reauthorize the TSP when the current authorization expires. This report examines the creation, membership, structure, and jurisdiction of these courts. It will be updated as subsequent events may require.

Contents

Introduction	1
Membership and Structure of the U.S. Foreign Intelligence Surveillance Court and the U.S. Foreign Intelligence Surveillance Court of Review	4
Jurisdiction of the U.S. Foreign Intelligence Surveillance Court	6
Electronic Surveillance and Physical Searches	6
Pen Registers and Trap and Trace Devices	7
Production of Tangible Things	8
Review of Petitions Challenging Production Orders for Tangible Things or Related Nondisclosure Orders	8
Motions to suppress information obtained by or derived from electronic surveillance, physical search, or pen registers or trap and trace devices under FISA are heard by U.S. district courts ..	9
Jurisdiction of the Court of Review	10
U.S. Supreme Court Jurisdiction	11

The U.S. Foreign Intelligence Surveillance Court and the U.S. Foreign Intelligence Surveillance Court of Review: An Overview

Introduction

The Foreign Intelligence Surveillance Act of 1978 (FISA), P.L. 95-511, 50 U.S.C. § 1801 et seq., as amended, provides a statutory framework for the U.S. government to engage in electronic surveillance¹ and physical searches² to obtain

¹ Under subsection 101(f) of FISA, 50 U.S.C. § 1801(f), the term “electronic surveillance” means:

- (1) the acquisition by an electronic, mechanical, or other surveillance device of the contents of any wire or radio communication sent by or intended to be received by a particular, known United States person who is in the United States, if the contents are acquired by intentionally targeting that United States person, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes;
- (2) the acquisition by an electronic, mechanical, or other surveillance device of the contents of any wire communication to or from a person in the United States, without the consent of any party thereto, if such acquisition occurs in the United States, but does not include the acquisition of those communications of computer trespassers that would be permissible under section 2511(2)(i) of Title 18;
- (3) the intentional acquisition by an electronic, mechanical, or other surveillance device of the contents of any radio communication, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes, and if both the sender and all intended recipients are located within the United States; or
- (4) the installation or use of an electronic, mechanical, or other surveillance device in the United States for monitoring to acquire information, other than from a wire or radio communication, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes.

The provisions dealing with such electronic surveillance are found in title I of FISA, 50 U.S.C. § 1801 et seq., while the provisions addressing physical searches are located in title III of FISA, 50 U.S.C. § 1821 et seq.

² Subsection 301(5) of FISA, 50 U.S.C. § 1821(5) defines the term “physical search” to mean:

any physical intrusion within the United States into premises or property (including examination of the interior of property by technical means) that is intended to result in a seizure, reproduction, inspection, or alteration of

(continued...)

foreign intelligence information.³ It also provides a statutory structure for the installation and use of pen registers and trap and trace devices⁴ for use in federal investigations to obtain foreign intelligence information not concerning a U.S. person or to protect against international terrorism or clandestine intelligence activities.

² (...continued)

information, material, or property, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes, but does not include (A) “electronic surveillance”, as defined in section 1801(f) of this title, or (B) the acquisition by the United States Government of foreign intelligence information from international or foreign communications, or foreign intelligence activities conducted in accordance with otherwise applicable Federal law involving a foreign electronic communications system, utilizing a means other than electronic surveillance as defined in section 1801(f) of this title.

³ Subsection 101(e) of FISA, 50 U.S.C. § 1801(e), defines “foreign intelligence information” to mean:

- (1) information that relates to, and if concerning a United States person is necessary to, the ability of the United States to protect against —
 - (A) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power;
 - (B) sabotage or international terrorism by a foreign power or an agent of a foreign power; or
 - (C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power; or
- (2) information with respect to a foreign power or foreign territory that relates to, and if concerning a United States person is necessary to —
 - (A) the national defense or the security of the United States; or
 - (B) the conduct of the foreign affairs of the United States.

⁴ Pen registers and trap and trace devices are addressed in title IV of FISA, 50 U.S.C. § 1841 et seq. Subsection 401(2) of FISA, 50 U.S.C. § 1841(2) defines “pen register” and “trap and trace device” by cross-reference to 18 U.S.C. § 3127. Under 18 U.S.C. § 3127(3), “pen register” is defined to mean:

a device or process which records or decodes dialing, routing, addressing, or signaling information transmitted by an instrument or facility from which a wire or electronic communication is transmitted, provided, however, that such information shall not include the contents of any communication, but such term does not include any device or process used by a provider or customer of a wire or electronic communication service for billing, or recording as an incident to billing, for communications services provided by such provider or any device or process used by a provider or customer of a wire communication service for cost accounting or other like purposes in the ordinary course of its business.

The term “trap and trace device” is defined under 18 U.S.C. § 3127(4) to mean:

a device or process which captures the incoming electronic or other impulses which identify the originating number or other dialing, routing, addressing, and signaling information reasonably likely to identify the source of a wire or electronic communication, provided, however, that such information shall not include the contents of any communication.

Such an investigation of a U.S. person may not be conducted solely on the basis of activities protected by the First Amendment to the Constitution.⁵

In addition, FISA provides statutory authority for the Director of the Federal Bureau of Investigation (FBI) or his designee to seek a U.S. Foreign Intelligence Surveillance Court (FISC) order authorizing the production of any tangible things (including books, records, papers, documents, and other items) for an investigation to obtain foreign intelligence information not concerning a U.S. person or to protect against international terrorism or clandestine intelligence activities. Again, such an investigation of a U.S. person may not be conducted solely on the basis of First Amendment-protected activities.⁶ A production order for tangible things may be accompanied by a nondisclosure order. Under Section 501(d) of FISA, 50 U.S.C. § 1861(d), no person shall disclose to any other person that the FBI has sought or obtained tangible things pursuant to an order under this section, other than to those persons to whom disclosure is necessary to comply with such order, an attorney to obtain legal advice or assistance with respect to the production of things in response to the order, or other persons as permitted by the Director of the FBI or the designee of the Director. A person to whom a disclosure is made is also subject to the nondisclosure requirements. Any person making or intending to make a disclosure to a person to whom disclosure is necessary to comply with the order or to whom disclosure is permitted by the Director of the FBI or his designee must, at the request of the Director or his designee, identify the person to whom disclosure is to be or has been made.

⁵ Section 402 of FISA, 50 U.S.C. § 1842.

⁶ Section 501 of FISA, 50 U.S.C. § 1861.

With limited exceptions,⁷ electronic surveillance and physical searches may be conducted under FISA pursuant to court orders issued by a judge of the FISC, and pen registers and trap and trace devices may be installed and used pursuant to the order of a FISC judge or a U.S. Magistrate Judge authorized to act in that judge's behalf. In all instances in which the production of any tangible thing is required under FISA, an order from a FISC judge or a U.S. Magistrate Judge authorized to act in the judge's behalf must be obtained. Appeals from the denial of applications for FISC orders approving electronic surveillance, physical search, or production of tangible things may be made by the U.S. government to the U.S. Foreign Intelligence Court of Review (Court of Review). If the denial of an application is upheld by the Court of Review, a petition for certiorari may be filed to the U.S. Supreme Court.

This report discusses the creation and structure of the Foreign Intelligence Surveillance Court and the Foreign Intelligence Court of Review and their respective jurisdictions.

Membership and Structure of the U.S. Foreign Intelligence Surveillance Court and the U.S. Foreign Intelligence Surveillance Court of Review

Section 103 of the Foreign Intelligence Surveillance Act, as amended, 50 U.S.C. § 1803, establishes the U.S. Foreign Intelligence Surveillance Court and the U.S.

⁷ In the case of FISA electronic surveillance, those exceptions may be found in sections 102 (electronic surveillance for foreign intelligence purposes of certain types of foreign powers, as defined under section 101(a)(1), (2), and (3), 50 U.S.C. §§ 1801(a)(1), (2), and (3), upon Attorney General certification), 105(f) (emergency authorization by the Attorney General for up to 72 hours, if specified criteria are met, while an application for a FISC order is pursued), and 111 of FISA (authority electronic surveillance without a court order for up to 15 calendar days following a congressional declaration of war), 50 U.S.C. §§ 1802, 1805(f) and 1811, respectively. The exceptions to the requirement for a court order for FISA physical searches may be found at sections 302 (physical searches for foreign intelligence purposes with respect to certain types of foreign powers, as defined under section 101(a)(1), (2), and (3), 50 U.S.C. §§ 1801(a)(1), (2), and (3), upon Attorney General certification), 304(e) (emergency authorization by the Attorney General for up to 72 hours, if specified criteria are met, while an application for a FISC order is pursued) and 309 (authority for physical searches for up to 15 calendar days following a congressional declaration of war) of FISA, 50 U.S.C. §§ 1822, 1824(e), and 1829, respectively. The exceptions with respect to FISA pen registers and trap and trace devices may be found at sections 403 (emergency authorization by the Attorney General for up to 48 hours, if specified criteria are met, while an application for a FISC order is pursued) and 404 (authority for installation and use of pen registers and trap and trace devices for up to 15 calendar days following a congressional declaration of war) of FISA, 50 U.S.C. §§ 1843 and 1844, respectively.

A “foreign power,” as defined in subsection (a)(1), (2), or (3), 50 U.S.C. §§ 1801(a)(1), (2), or (3), means “(1) a foreign government or any component thereof, whether or not recognized by the United States;” “(2) a faction of a foreign nation or nations, not substantially composed of United States persons;” or “(3) an entity that is openly acknowledged by a foreign government or governments to be directed and controlled by such foreign government or governments.”

Foreign Intelligence Surveillance Court of Review. The FISC is composed of 11 U.S. district court judges publicly designated by the Chief Justice of the United States from seven circuits, at least three of whom must reside within 20 miles of the District of Columbia.⁸ The Chief Justice publicly designates one of the FISC judges to be presiding judge.

Although there is a procedure for the publication of FISC opinions, such publication is extremely rare. Only one opinion has been published since the court's inception in 1978, *In re All Matters Submitted to the Foreign Intelligence Surveillance Court*, 218 F. Supp. 2d 611 (U.S. Foreign Intell. Surveil. Ct. 2002). Under Foreign Intelligence Surveillance Court Rule 5(c),

[o]n request by a Judge, the Presiding Judge, after consulting with other Judges of the Court, may direct that an Opinion be published. Before publications, the Opinion must be reviewed by the Executive Branch and redacted, as necessary, to ensure that properly classified information is appropriately protected pursuant to Executive Order 12958 as amended by Executive Order 13292 (or its successor).

Three of the FISC judges who reside within 20 miles of the District of Columbia, or, if all of those judges are unavailable, other FISC judges designated by the presiding judge of the FISC, comprise a petition review pool that has jurisdiction to review petitions filed pursuant to subsection 501(f)(1) of FISA, 50 U.S.C. § 1861(f)(1), to challenge a production order for tangible things in a foreign intelligence, international terrorism, or clandestine intelligence activities investigation under section 501 of FISA, or a nondisclosure order imposed in connection with such a production order.⁹

The Court of Review is composed of three judges publicly designated by the Chief Justice from the United States district courts or courts of appeals. The Chief Justice also publicly designates one of the three judges as the presiding judge of the court.¹⁰ Only one opinion has been published by the Court of Review, *In re Sealed Case*, 310 F.3d 717 (U.S. Foreign Intell. Surveil. Ct. Rev. 2002), which is the first opinion the court has issued.

Each FISC and Court of Review judge serves for a maximum of seven years and is not eligible for redesignation.¹¹

⁸ Subsection 103(a) of FISA, 50 U.S.C. § 1803(a).

⁹ Subsection 103(e)(1) of FISA, 50 U.S.C. § 1803(e)(1). Under subsection 103(f)(2) of FISA, 50 U.S.C. § 1803(f)(2), within sixty days after March 9, 2006, the FISC was directed to adopt and, consistent with the protection of national security, publish procedures for the review of petitions filed pursuant to subsection 501(f)(1) of FISA, 50 U.S.C. § 1861(f)(1) the petition review pool. Subsection 501(f)(2) requires that such procedures provide that review of a petition shall be conducted in camera and also provide for the designation of an acting presiding judge of the panel.

¹⁰ Subsection 103(b) of FISA, 50 U.S.C. § 1803(b).

¹¹ Subsection 103(d) of FISA, 50 U.S.C. § 1803(d).

Jurisdiction of the U.S. Foreign Intelligence Surveillance Court

Electronic Surveillance and Physical Searches

The FISC has jurisdiction to hear applications¹² for and to grant court orders approving electronic surveillance or physical searches anywhere in the United States to obtain foreign intelligence information under FISA.¹³ No FISC judge may hear an application for electronic surveillance or a physical search under FISA that has been denied previously by another FISC judge.¹⁴ In general, such applications are either granted, granted as modified, or denied.¹⁵ If a FISC judge denies an application for an order authorizing electronic surveillance under FISA,¹⁶ such judge shall provide immediately for the record a written statement of each reason for his or her decision and, on motion of the United States, the record shall be transmitted, under seal, to the Court of Review. Proceedings in the FISC, conducted pursuant to procedures adopted under subsection 103(f)(1) of FISA, 50 U.S.C. § 1803(f)(1),¹⁷ and

¹² The requirements for an application for a court order authorizing electronic surveillance under FISA are set out in section 104 of FISA, 50 U.S.C. § 1804. The requirements for an application authorizing a physical search under FISA are set out in section 303 of FISA, 50 U.S.C. § 1823.

¹³ Subsection 103(a) of FISA, 50 U.S.C. § 1803(a) (electronic surveillance); subsection 302(c) of FISA, 50 U.S.C. § 1822(c) (physical searches).

¹⁴ *Id.*

¹⁵ The number of applications for electronic surveillance and physical searches under FISA granted, modified, and denied each year are reported to the Congress and to the Administrative Office in reports which are publicly available at [http://www.usdoj.gov/ag/readingroom/ag_foia1.htm], listed under “Annual Foreign Intelligence Surveillance Act Reports.” Annual reporting of electronic surveillance information is required by the congressional oversight requirements of sections 107 of FISA, 50 U.S.C. § 1807. There is no precisely parallel reporting requirement in FISA regarding physical searches, pen registers and trap and trace devices, or production of tangible things. Section 306 of FISA, 50 U.S.C. § 1826, requires such reports to on a semi-annual rather than an annual basis on physical searches. There are more detailed semi-annual congressional reporting requirements placed upon the Attorney General with respect to electronic surveillances, section 108 of FISA, 50 U.S.C. § 1808; physical searches, section 306 of FISA, 50 U.S.C. § 1826; and pen registers and trap and trace devices, section 406 of FISA, 50 U.S.C. § 1846; and annual reporting requirements with respect to production of tangible things, section 502 of FISA, 50 U.S.C. § 1862. Additional reporting requirements were added by the Intelligence Reform and Terrorism Prevention Act, P.L. 108-458, and codified as a new section 601 of FISA, 50 U.S.C. § 1871.

¹⁶ The requirements for issuance of a FISC order granting an application for electronic surveillance under FISA are set out in section 105 of FISA, 50 U.S.C. § 1805, while the requirements for issuance of a FISC order granting an application for a physical search under FISA are set out in section 304 of FISA, 50 U.S.C. § 1824.

¹⁷ *Id.* Under subsection 103(f)(1), 50 U.S.C. § 1803(f)(1), the FISC and the Court of Review may establish such rules and procedures, and take such actions, as are reasonably necessary to administer their responsibilities under FISA. Subsection 103(f)(2), 50 U.S.C. § (continued...)

proceedings of the Court of Review, are to be conducted as expeditiously as possible. The record of such proceedings, including applications made and orders granted, must be maintained under security measures established by the Chief Justice in consultation with the Attorney General and the Director of National Intelligence.¹⁸

Pen Registers and Trap and Trace Devices

Either a FISC judge or a U.S. Magistrate Judge publicly designated by the Chief Justice to act on behalf of such judge may hear applications¹⁹ for and grant orders²⁰ approving installation and use of pen registers and trap and trace devices²¹ for an investigation to obtain foreign intelligence information not concerning a U.S. person²² or to protect against international terrorism²³ or clandestine intelligence

¹⁷ (...continued)

1803(f)(2), requires that rules and procedures so established, and any modifications thereto, must be recorded and must be transmitted to all of the judges on the FISC, all of the judges on the Court of Review, the Chief Justice of the United States, the House and Senate Judiciary Committees, the Senate Select Committee on Intelligence, and the House Permanent Select Committee on Intelligence. Such transmissions are to be submitted in unclassified form, but may include a classified annex. The FOREIGN INTELLIGENCE SURVEILLANCE COURT RULES OF PROCEDURE and the PROCEDURES FOR REVIEW OF PETITIONS FILED PURSUANT TO SECTION 501(F) OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT OF 1978, AS AMENDED are available at [<http://www.uscourts.gov/rules/fisa.html>]. No rules of procedure for the Court of Review have been identified, although section 103(f)(1)t also provides that court with authority to establish such rules.

¹⁸ Subsection 103(c) of FISA , 50 U.S.C. § 1803(c) (electronic surveillance); subsection 302(e), 50 U.S.C. § 1822(e) (physical searches).

¹⁹ The requirements for an application for a pen register or trap and trace device under FISA are set forth in subsection 402(a)-(c) of FISA, 50 U.S.C. § 1842(a)-(c).

²⁰ The requirements for issuance of a FISC order authorizing a pen register or trap and trace device under FISA are set forth in subsection 402(d) of FISA, 50 U.S.C. § 1842(d).

²¹ Subsections 402(b) or (d), 50 U.S.C. §§ 1842(b) or (d).

²² Under subsection 101(i) of FISA, 50 U.S.C. § 1801(i), a “United States person” is defined to mean “a citizen of the United States, an alien lawfully admitted for permanent residence (as defined in section 1101(a)(20) of Title 8), an unincorporated association a substantial number of members of which are citizens of the United States or aliens lawfully admitted for permanent residence, or a corporation which is incorporated in the United States, but does not include a corporation or an association which is a foreign power, as defined in subsection (a)(1), (2), or (3) of this section.” As noted above, a “foreign power,” as defined in subsection (a)(1), (2), or (3), 50 U.S.C. §§ 1801(a)(1), (2), or (3), means “(1) a foreign government or any component thereof, whether or not recognized by the United States;” “(2) a faction of a foreign nation or nations, not substantially composed of United States persons;” or “(3) an entity that is openly acknowledged by a foreign government or governments to be directed and controlled by such foreign government or governments.”

²³ Under subsection 101(c) of FISA, 50 U.S.C. § 1801(c), “international terrorism” means activities that “(1) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or any State;” “(2) appear (continued...)

activities, provided that such investigation of a U.S. person is not conducted solely on the basis of activities protected by the First Amendment to the Constitution.

Production of Tangible Things

As in the case of pen registers and trap and trace devices, either a FISC judge or a U.S. Magistrate Judge publicly designated by the Chief Justice to act on behalf of such judge may hear applications²⁴ for and grant orders²⁵ approving production of any tangible thing²⁶ for an investigation to obtain foreign intelligence information not concerning a U.S. person or to protect against international terrorism or clandestine intelligence activities, provided that such investigation of a U.S. person is not conducted solely upon the basis of activities protected by the First Amendment to the Constitution.

Review of Petitions Challenging Production Orders for Tangible Things or Related Nondisclosure Orders

A person who receives a production order may challenge that order by filing a petition with the petition review pool created by section 103(e) of FISA, 50 U.S.C. § 1803(e). The recipient of a production order must wait at least a year before challenging the nondisclosure order imposed in connection with that production order by filing a petition with the petition review pool to modify or set aside the nondisclosure order.²⁷ If the judge denies a petition to modify or set aside a nondisclosure order, the recipient of such order must wait at least another year before filing another such petition with respect to such nondisclosure order. Any production or nondisclosure order not explicitly modified or set aside remains in full effect.²⁸

Judicial proceedings under this subsection are conducted under the PROCEDURES FOR REVIEW OF PETITIONS FILED PURSUANT TO SECTION 501(F) OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT OF 1978, AS AMENDED, and are to be concluded as expeditiously as possible. The record of proceedings, including petitions filed, orders granted, and statements of reasons for decision, are maintained under security

²³ (...continued)

to be intended — (A) to intimidate or coerce a civilian population; (B) to influence the policy of a government by intimidation or coercion; or (C) to affect the conduct of a government by assassination or kidnapping;” and “(3) occur totally outside the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to coerce or intimidate, or the locale in which their perpetrators operate or seek asylum.”

²⁴ The requirements for an application for a FISC order for production of tangible things under FISA are set forth in subsection 501(a) and (b) of FISA, 50 U.S.C. § 1861(a) and (b).

²⁵ The requirements for issuance of a FISC order for production of tangible things under FISA are set forth in subsection 501(c) of FISA, 50 U.S.C. § 1861(c).

²⁶ Subsections 501(b)(1) and (c), 50 U.S.C. §§ 1861(b)(1) and (c).

²⁷ Subsection 501(f)(2)(A)(i), 50 U.S.C. § 1861(f)(2)(A)(i).

²⁸ Subsection 501(f)(2)(C) and (D), 50 U.S.C. § 1861(f)(2)(C) and (D).

measures established by the Chief Justice of the United States, in consultation with the Attorney General and the Director of National Intelligence.²⁹ All petitions under this subsection are filed under seal. In any proceedings under this subsection, the court shall, upon request of the government, review *ex parte* and in camera any government submission, or portions thereof, that may include classified information.³⁰

Motions to suppress information obtained by or derived from electronic surveillance, physical search, or pen registers or trap and trace devices under FISA are heard by U.S. district courts. The procedure for challenging production or nondisclosure orders before the petition review pool of the FISC contrasts with that applicable to motions to suppress information obtained through or derived from electronic surveillance, physical search, or the installation and use of a pen register or trap and trace device under FISA, which a federal, state, or local government intends to use or disclose in a trial or other official proceeding. If a federal, state, or local government intends to use or disclose information obtained by or derived from a FISC order authorizing electronic surveillance, a physical search, or the use of a pen register or trap and trace device, any challenges to the use or disclosure of that information must be made in the U.S. district court in which the motion or request is made, or, if the motion or request is made before another federal, state, or local authority, in the United States district court in the same district as that authority. Such challenges may include motions to suppress made under FISA by an “aggrieved person”³¹ against whom such information is intended to be used or disclosed; and any motion or request made by an aggrieved person pursuant to any other statute or rule of the United States or any state before any court or other authority of the United States or any state to discover or obtain applications or orders or other materials relating to FISA electronic surveillance, physical search, or use of a pen register or trap and trace device or to

²⁹ Subsection 501(f)(4), 50 U.S.C. § 1861(f)(4).

³⁰ Subsection 501(f)(5), 50 U.S.C. § 1861(f)(5).

³¹ The term “aggrieved person” is defined with respect to the use of electronic surveillance under FISA in subsection 101(k), 50 U.S.C. § 1801(k) to mean “a person who is the target of an electronic surveillance or any other person whose communications or activities were subject to electronic surveillance.” When defined with respect to the use of physical searches under FISA, the term is defined by subsection 301(2) of FISA, 50 U.S.C. § 1821(2), to mean “a person whose premises, property, information, or material is the target of physical search or any other person whose premises, property, information, or material was subject to physical search.” In connection with the use of a pen register or trap and trace device pursuant to FISA, the term is defined under subsection 401(3) of FISA, 50 U.S.C. § 1841(3) to mean any person “whose telephone line was subject to the installation or use of a pen register or trap and trace device authorized by this subchapter;” or “whose communication instrument or device was subject to the use of a pen register or trap and trace device authorized [under title IV of FISA] to capture incoming electronic or other communications impulses.” The term is not used in connection with production of tangible things under title V of FISA, 50 U.S.C. § 1861-1862.

discover, obtain, or suppress evidence or information obtained or derived from the use of such investigative techniques under FISA.³²

Similar, but not identical, to the proceedings before the petition review panel regarding production orders or nondisclosure orders, the U.S. district court proceedings addressing motions to suppress information obtained by or derived from a FISA electronic surveillance, physical search, or pen register or trap and trace device, or seeking to discover or obtain related materials may be considered ex parte and in camera if the Attorney General files an affidavit under oath that disclosure or any adversary hearing would harm the national security of the United States.

If the United States district court determines that the electronic surveillance, physical search, or installation and use of the pen register or trap and trace device in regard to the aggrieved person was not lawfully authorized or conducted, it shall, in accordance with the requirements of law, suppress the evidence that was unlawfully obtained or derived therefrom or otherwise grant the motion of the aggrieved person. If the court determines that the electronic surveillance, physical search, or installation and use of a pen register or trap and trace device was lawfully authorized or conducted, it shall deny the motion of the aggrieved person except to the extent that due process requires discovery or disclosure.

Orders granting such motions or requests, decisions that a FISA electronic surveillance, physical search, or installation and use of a pen register or trap and trace device was not lawfully authorized or conducted, and orders of the United States district court requiring review or granting disclosure of applications, orders, or other materials relating thereto shall be final orders and binding upon all courts of the United States and the several states except a United States Court of Appeals or the Supreme Court.

Jurisdiction of the Court of Review

The government may seek review of a denial of an application for a court order under FISA authorizing electronic surveillance, physical search, or production of any tangible thing before the Court of Review.³³ If the denial is upheld by the Court of Review, the government may seek U.S. Supreme Court review of the decision by a petition for certiorari.³⁴

³² See subsection 106(c)-(h) of FISA, 50 U.S.C. § 1806(c)-(h) (electronic surveillance); subsection 305(d)-(i), 50 U.S.C. § 1825(d)-(i) (physical searches); 406(c)-(h) of FISA, 50 U.S.C. § 1846(c)-(h) (pen registers or trap and trace devices).

³³ The Foreign Intelligence Surveillance Court of Review is established under subsection 103(b), 50 U.S.C. § 1803(b). The Chief Justice publicly designates one of the Court of Review judges to be the presiding judge.

³⁴ The U.S. Supreme Court is given jurisdiction over denials of applications which have been upheld by the Court of Review in subsection 103(b), 50 U.S.C. § 1803(b).

In addition, the Court of Review has jurisdiction over petitions for review of a decision under section 501(f)(2) of FISA, 50 U.S.C. § 1861(f)(2), to affirm, modify, or set aside a production order or nondisclosure order filed by the government or any person receiving such an order.³⁵ Upon the request of the government, any order setting aside a nondisclosure order shall be stayed pending such review.³⁶

The Court of Review shall provide for the record a written statement of the reasons for its decision and, on petition by the government or any person receiving such order for writ of certiorari, the record shall be transmitted under seal to the Supreme Court of the United States, which shall have jurisdiction to review such decision.

U.S. Supreme Court Jurisdiction

The U.S. Supreme Court has jurisdiction, on a petition for certiorari, to review decisions of the Court of Review affirming a denial of an application for an order authorizing electronic surveillance, physical searches, production orders, or nondisclosure orders under FISA.

³⁵ Subsection 501(f)(3) of FISA, 50 U.S.C. § 1861(f)(3).

³⁶ Subsection 501(f)(2)(C)(iii), 50 U.S.C. § 1861(f)(2)(C)(iii).